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Promoting "Inclusive Communities": A Modified Approach to Disparate Impact Under the Fair Housing Act

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INTRODUCTION

In New Orleans, a cursory examination of the city's neighborhoods and surrounding areas tells the story. Lime green dots shade almost the entirety of Central City, Algiers, Gentilly, New Orleans East, and the Lower Ninth Ward.[1] Conversely, blue dots predominate in Uptown, Algiers Point, Lakeview, Metairie, the Garden District, and the French Quarter.[2] In Detroit, 8 Mile Road forms the line of demarcation, blue dots blanketing north of the road and green dots covering the south.[3] Atlanta, Birmingham, Chicago, and St. Louis present similar pictures.[4] The colored dots reflect data from the 2010 Census: one dot for every individual; green represents blacks, and blue represents whites.[5] The images described come from "the most comprehensive map of race in America ever created."[6] The map—particularly the close-ups of individual cities—shows conclusively that racial segregation continues to plague this country's residential communities.[7] Although a few cities such as New York, San Francisco, and Los Angeles have more integrated neighborhoods, racial segregation proves to be the norm.[8]

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1. Dustin A. Cable, *The Racial Dot Map,* WELDON COOPER CTR. FOR PUB. SERV., UNIV. OF VA., http://demographics.coopercenter.org/DotMap/index.html, archived at http://perma.cc/7MEA-7WUH.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* Further, red represents Asians, orange represents Hispanics, and brown represents all others. *Id.*
6. Kyle Vanhemert, *The Best Map Ever Made of America's Racial Segregation*, WIRED (Aug. 26, 2013, 6:30 AM), http://www.wired.com/design/2013/08/how-segregated-is-your-city-this-eye-opening-map-shows-you/?viewall=true, archived at http://perma.cc/X6XX-CWG3 (presenting the work of Dustin Cable, a statistician at the University of Virginia).
7. *See* Cable, *supra* note 1.
8. *Id.*

Almost 50 years ago, the passage of the Fair Housing Act (FHA) provided a potential solution to the segregation of American neighborhoods.[9] A primary purpose of the FHA, "which was passed as an immediate response to Dr. King's assassination, was to replace the ghettos with 'truly integrated and balanced living patterns.'"[10] Congress believed that the FHA's ban on discriminatory housing practices would lead to more integrated communities.[11] However, as scholars have noted and census data indicates, truly integrated communities have not emerged.[12] Despite the passage of the FHA, one of the primary causes of America's segregated communities continues to be housing discrimination.[13] "Each year, tens of thousands of FHA complaints are filed, and these complaints represent 'only a fraction of instances of housing discrimination' that actually occur annually, which is estimated to be about 4,000,000."[14]

One tool for fighting housing discrimination, in addition to the well-established disparate treatment doctrine,[15] is disparate impact theory.[16] As opposed to disparate treatment, which only targets practices motivated by discriminatory intent, disparate impact focuses on practices that have discriminatory effects on protected classes of people. Legal scholars disagree on the ultimate purpose of the disparate impact theory; some claim that it is meant solely to

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9. 42 U.S.C. §§ 3601–3631 (2012).

10. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 125 (2012) (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale)).

11. *See* 114 CONG. REC. 3422 (1968). Senator Mondale stated that the goal of the FHA was to replace the ghettos with "truly integrated and balanced living patterns." *Id.*

12. Schwemm, *supra* note 10, at 125, 132–33 (noting that *American Apartheid*, a 1990s commentary on segregation in this country, recognized that racial segregation is "the principal organizational feature of American society" and that the 2010 census data indicates that "the United States is still a residentially segregated society").

13. *Id.* at 134 ("Another cause of segregation is housing discrimination against racial minorities . . . ."); Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 65 (1998) ("African Americans found themselves limited to de facto segregated geographies by public and private discrimination.").

14. Schwemm, *supra* note 10, at 134–35 (quoting U.S. DEP'T OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING: FY 2008 ANNUAL REPORT ON FAIR HOUSING 2 (2009), *available at* http://www.hud.gov/content/releases/fy2008annual-rpt.pdf, archived at http://perma.cc/4GG4-XVBX).

15. *See infra* Part I.A.

16. *See infra* Part I.B.

provide for inadvertent, effects-based liability,[17] while others argue that it is designed to smoke out well-disguised unlawful intent,[18] but the practical reality is that it can be used to fight effectively against both.[19] Over the past 40 years, though, FHA plaintiffs have had little success with disparate impact claims.[20] Scholars have attributed the theory's failure to the lack of a clear standard,[21] which is the result of a circuit split over the proper analysis,[22] as well as the theory's use as a "Plan B" to disparate treatment claims,[23] which very well could be the consequence of disparate impact's illusory analytical framework. Either way, disparate impact's failure has contributed to the persistence of housing discrimination, and far too many instances go unchallenged.[24]

Rather than looking to resolve the circuit split over the proper standard, the Supreme Court appears destined to read disparate

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17. *See* Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Anti-Discrimination Law*, 42 WAKE FOREST L. REV. 1141, 1198 (2007) [hereinafter Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*].

18. *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299 (1987).

19. *See infra* Part III.

20. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 393 (2013) [hereinafter Seicshnaydre, *Is Disparate Impact Having Any Impact?*] ("What is abundantly clear when analyzing the FHA disparate impact case law over the past forty years is that the appellate courts have had little difficulty disposing of all manner of disparate impact claims under the FHA. . . . [P]laintiffs have received positive decisions in less than 20%, or eighteen of the ninety-two FHA disparate impact claims considered on appeal.").

21. Jennifer L. Peresie, *Toward A Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 774–75 (2009) (claiming that a lack of coherency involving disparate impact standards in both the employment and fair housing contexts likely factors into a potential plaintiff's decision whether to bring suit). *See also* Rebecca Tracy Rotem, Note, *Using Disparate Impact in Fair Housing Act Claims: Landlord Withdrawal From the Section 8 Voucher Program*, 78 FORDHAM L. REV. 1971, 1991 (2010) (explaining that a lack of clarity regarding the discriminatory effects test has raised questions of how and when to use an FHA disparate impact analysis in the context of Section 8 voucher discrimination claims).

22. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

23. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*, *supra* note 17, at 1148–49; Seicshnaydre, *Is Disparate Impact Having Any Impact?*, *supra* note 20, at 393.

24. *See supra* note 14.

impact theory out of the FHA.[25] The Court first signaled the theory's eventual demise with its decision in *Ricci v. DeStefano*, an employment discrimination case.[26] Moreover, the Court's recent desire to address the viability of disparate impact under the FHA,[27] despite no circuit split on that issue,[28] further indicates that the theory's days are likely numbered.[29] With this in mind, fair

25. *See* Stephanie Sheeley, *Settlement in Mount Holly, New Jersey*, THE FHACTS: THE FAIR HOUSING ACTION CENTER BLOG (Nov. 25, 2013), http://www.gnofairhousing.org/2013/11/25/settlement-in-mount-holly-new-jersey/, archived at http://perma.cc/F3KQ-9DZW ("Many commentators speculated that today's conservative-leaning Supreme Court would have decided the question in a way that contravened all of the other courts to have ever ruled on the issue and similarly contravened established, previously uncontroversial principles of law."); *see infra* Part I.E.

26. 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (remarking that this decision "merely postpones the evil day on which the Court will have to confront the question" of whether disparate impact theory violates the Equal Protection Clause). *See infra* Part II.A.1.

27. Since 2011, the Court has granted certiorari in three cases presenting the issue of whether disparate impact claims are cognizable under the FHA. *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014), *cert granted*, http://www.supremecourt.gov/orders/courtorders/100214zr_086c.pdf, archived at http://perma.cc/EB5B-55VL (U.S. Oct. 2, 2014) (No. 13-1371); Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 133 S. Ct. 2824 (2013); Magner v. Gallagher, 132 S. Ct. 1306 (2012).

28. All 11 circuits that have considered whether the FHA includes a disparate-impact standard have found in the affirmative. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100). *See* 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006); Macone v. Town of Wakefield, 277 F.3d 1, 5 (1st Cir. 2002); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48 (2d Cir. 2002); Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 381 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 790 (6th Cir. 1996); East-Miller v. Lake Cnty. Highway Dep't, 421 F.3d 558, 563 (7th Cir. 2005); Keller v. City of Freemont, 719 F.3d 931, 948 (8th Cir. 2013); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1231 (10th Cir. 2007); Schwarz v. City of Treasure Island, 544 F.3d 1201, 1217 (11th Cir. 2008).

29. The Court reverses roughly two-thirds of the cases on which it grants certiorari, indicating, in this case, a potential desire to overturn the near-unanimous approval of an FHA disparate-impact standard by the Circuit Courts of Appeals. *See* Stephen J. Wermiel, *Supreme Court Reversals: Exploring the Seventh Circuit*, 32 S. ILL. U. L.J. 641, 643–44 (2008) (noting that from 2001 through 2006 the Court's reversal rate has been at a "consistent high of 70% or above"); *see also Circuit Scorecard: October Term 2012*, SCOTUSBLOG (June 27, 2013), http://scotusblog.com/wp-content/uploads/2013/06/scorecards_OT12.pdf, archived at http://perma.cc/ZF6P-6NTB (showing a 72% overall reversal rate for October Term

housing advocates have worked to keep the theory afloat by pushing for out-of-court settlements before the Supreme Court can speak on the issue.[30] In 2013, the Court granted certiorari in *Township of Mount Holly, New Jersey v. Mount Holly Gardens Citizens in Action* to decide whether the FHA supports disparate impact claims.[31] Yet, a month before the case was set for oral argument, the parties settled and kept the Court from addressing the disparate impact issue.[32] Similarly, an out-of-court settlement ended the Court's first attempt to address disparate impact under the FHA in the 2011 case of *Gallagher v. Magner*.[33] Although settling cases out from under the Court has temporarily avoided the Court's seemingly inevitable rejection of FHA disparate impact claims,[34] this issue is far from resolved.

In the 2014–2015 Term, the Court picked up the issue once again in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[35] And while the ultimate outcome of *Inclusive Communities* is still unknown, only two results appear likely: Civil rights advocates will succeed in pushing for another settlement, or the Court will finally strike down disparate impact under the FHA. Either way, Congress must act to permanently guarantee the use of disparate impact theory in fair

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2012); *Circuit Scorecard: October Term 2011*, SCOTUSBLOG (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_scorecard_OT11_final.pdf, archived at http://perma.cc/492Q-2QJ9 (showing a 63% overall reversal rate for October Term 2011).

30. *See* Greg Stohr, *Landmark Housing Law Challenged in High Court Bias Case*, BLOOMBERG (Oct. 2, 2014, 11:16 AM), http://www.bloomberg.com/news/2014-10-02/texas-housing-bias-case-gets-u-s-supreme-court-review.html, archived at http://perma.cc/73CN-UMEP; Adam Liptak, *Fair-Housing Case Is Settled Before It Reaches Supreme Court*, N.Y. TIMES (Nov. 13, 2013), http://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html?_r=0, archived at http: //perma.cc/QVG3-XKEM.

31. 133 S. Ct. 2824 (2013).

32. Alan S. Kaplinsky, *Mount Holly Settlement Update*, JDSUPRA BUSINESS ADVISOR (Nov. 7, 2013), *available at* http://www.jdsupra.com/legalnews/mount-holly-settlement-update-34745/, archived at http://perma.cc/6ZV9-YVPR.

33. Lyle Denniston, *Fair Housing Case Dismissed*, SCOTUSBLOG (Feb. 10, 2012, 2:27 PM), http://www.scotusblog.com/2012/02/fair-housing-case-dismissed, archived at http://perma.cc/YG65-9M7F; Magner v. Gallagher, 132 S. Ct. 1306 (2012).

34. *See infra* Part II.A.

35. Inclusive Cmtys. Project, Inc. v. Tex. Dep't Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014), *cert granted*, http://www.supremecourt.gov/orders/courtorders/100214zr_086c.pdf, archived at http://perma.cc/EB5B-55VL (U.S. Oct. 2, 2014) (No. 13-1371).

housing by amending the FHA to explicitly include a disparate impact cause of action.

This Comment proposes a congressional response to the outcome in *Inclusive Communities* (whether by way of settlement or Supreme Court opinion) that will statutorily guarantee disparate impact claims within the Fair Housing Act, while also providing a statutorily-mandated "modified burden-shifting" standard for the clear, uniform, and effective adjudication of such claims. The FHA must continue to provide plaintiffs with the ability to raise disparate impact claims to effectively combat housing discrimination and facilitate an integrated society. Further, FHA disparate impact claims require a new, uniform standard for courts to apply with a structure reflecting the Act's purpose so that instances of discrimination decline and the majority of those that do occur do not continue to go unchallenged.[36]

The first Part of this Comment defines the disparate impact theory, explains the difference between it and disparate treatment, and traces its history from the employment context to fair housing law. Part II then addresses the current state of the theory under the FHA and proposes a congressional amendment that will guarantee a future for disparate impact claims under the FHA. After acknowledging that disparate impact in its current form is not perfect, Part III identifies the current deficiencies within the FHA disparate impact framework and proposes a solution: a modified burden-shifting standard. It then highlights the strength of this approach over other potential methods for rectifying the issues with disparate impact in the fair housing context and explains how the new standard can be incorporated into an amendment to the FHA. The pervasive racial segregation within today's American communities—nearly half of a century after the passage of the FHA—is unacceptable. This Comment proposes a solution to the issues and uncertainty surrounding disparate impact under the FHA, and in doing so, aims to provide potential litigants with a tool for eradicating the discriminatory housing practices that further residential segregation.

I. DISPARATE IMPACT THEORY: WHAT IT IS AND WHERE IT CAME FROM

The FHA prohibits discrimination based on race, color, religion, sex, familial status, national origin, or handicap in the sale, rental, or financing of housing.[37] It also makes unlawful any

36. *See supra* note 14.
37. 42 U.S.C. §§ 3604–3607 (2012).

other practices that deny housing, or make housing unavailable, on the basis of an individual's membership in any of the these protected classes.[38] Plaintiffs in FHA cases have two primary avenues through which to obtain relief: disparate treatment and disparate impact.[39]

A. Disparate Treatment

Under the FHA, disparate treatment refers to housing practices that intentionally treat similarly situated persons differently.[40] In other words, a practice qualifies as disparate treatment if it applies rules to a protected set of people that are different from the rules that it applies to others.[41] Take for instance a real estate agent who meets with two prospective tenants that have responded to an advertisement for a rental property.[42] One of the prospective tenants is white and the other is black.[43] The agent tells the white prospective tenant that the rental unit is a one-bedroom home available at $700 per month and that a deposit and first month's

38. *Id.*

39. Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 381 (6th Cir. 2007) (Moore, J., concurring) ("We have previously held that a plaintiff may establish a violation of the FHA by showing that the defendant has an intent to discriminate ('disparate treatment') or that an otherwise neutral practice has a disparate impact on a protected class ('disparate impact')."); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1229 (10th Cir. 2007) ("Discrimination may occur either by disparate treatment or disparate impact.").

40. *Reinhart*, 482 F.3d at 1229 ("A disparate-treatment claim requires proof of 'differential treatment of similarly situated persons or groups;' the discrimination must be intentional." (citations omitted)).

41. Sharpvisions, Inc. v. Borough of Plum, 475 F. Supp. 2d 514, 523 (W.D. Pa. 2007) ("Disparate treatment, under the FHA, may be shown by 'demonstrating that a given legislative provision discriminates against the handicapped on its face, i.e. applies different rules to the disabled than are applied to others.'" (quoting Arc of N.J., Inc. v. New Jersey, 950 F. Supp. 637, 643 (D.N.J. 1996))).

42. This hypothetical is based on the facts of *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir. 1999). For the purposes of this hypothetical, the facts were changed slightly to more clearly demonstrate the disparate treatment theory. In *Harris*, the real estate agent spoke to the prospective tenants over the phone when making the discriminatory statements. *Id.* at 1053. Although some may argue that racial discrimination is not possible via phone conversation because the alleged offender cannot actually see the other person's race, courts have held otherwise. *See, e.g.*, Lincoln v. Case, 340 F.3d 283, 286 (5th Cir. 2003) (describing telephone tests of landlord compliance with the FHA as evidence of housing discrimination); Alexander v. Riga, 208 F.3d 419, 424 (3d Cir. 2000) (holding that punitive damages are available in a case involving a telephone test).

43. *See Harris*, 183 F.3d at 1048.

rent will be needed to secure the home.[44] Then, while speaking to the black individual, the agent describes the rental as a small unit in a bad neighborhood.[45] The agent tells the black prospective tenant that he or she will have to contact the owner about the terms of the rental and that the cost of the unit may increase depending on how many people will occupy it.[46] This real estate agent has violated the FHA by intentionally treating the individuals differently based on their race, and the black individual would have a claim for disparate treatment under the FHA.[47]

B. Disparate Impact

On the other hand, disparate impact refers to practices that, on their face, appear non-discriminatory but actually, or predictably, lead to a disproportionate effect on members of a protected class.[48] Take, for example, a lending institution that offers loans to homeowners and prospective homeowners in urban areas.[49] That institution, however, has a policy that it only makes loans to individuals whose homes (or prospective homes) have values greater than $100,000.[50] In the urban areas in which the lender operates, though, the vast majority of homeowners whose properties are valued at less than $100,000 are black and Hispanic.[51] Accordingly, the vast majority of available homes at less than $100,000 lie in predominantly black and Hispanic neighborhoods, meaning that black and Hispanic individuals are more likely to try to acquire funding for homes in those areas.[52] Under this program, the lender denies a significant majority of loan applications for funding of homes in predominantly black and Hispanic neighborhoods, and thus black and Hispanic homeowners and prospective homeowners are denied loans at a significantly

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44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.* at 1053–54.
48. Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1229 (10th Cir. 2007) ("A disparate-impact claim, on the other hand, challenges a facially neutral policy that 'actually or predictably results in . . . discrimination.'" (quoting Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988))).
49. *See generally* Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co., 573 F. Supp. 2d 70 (D.D.C. 2008).
50. Complaint at 2, Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co., 573 F. Supp. 2d 70 (D.D.C. 2008) (No. 1:07-cv-01357-EGS).
51. *Id.*
52. *Id.*

higher rate than white applicants.[53] The lender's policy, although facially neutral, has a disproportionate effect on minority individuals.[54] Consequently, the lender's practice could be deemed a violation of the FHA under the disparate impact theory.[55]

However, disparate impact did not originate in the fair housing context. Rather, it emerged in the world of employment law and courts then extended it by analogy to the FHA.[56] The theory's development, though, has been marked with controversy and confusion.[57]

C. The Origins of Disparate Impact in Employment Law

From the inception of the Civil Rights Acts, courts and scholars alike recognized that liability for practices with a discriminatory effect was integral to effective enforcement of the Acts.[58] Seniority and testing systems used by employers for promotions and hiring decisions provided the impetus for this discovery.[59] Two cases in particular laid the groundwork for the development of disparate impact theory in employment law.[60]

1. Early Inklings of Disparate Impact

In 1968, the United States District Court for the Eastern District of Virginia, in *Quarles v. Philip Morris, Inc.*, equated the

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53. *See id.*

54. *See Nat'l Cmty. Reinvestment Coal.*, 573 F. Supp. 2d at 79.

55. *Id.*

56. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

57. *See infra* Part III; Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*, *supra* note 17, at 1141 ("[T]he theory remains misunderstood, mislabeled, and misused.").

58. *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968); Local 189, United Papermakers v. United States, 416 F.2d 980, 983 (5th Cir. 1969); George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967) [hereinafter Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*].

59. Seniority systems refer to promotion policies used by employers that rely on the amount of time an employee has worked in a certain department, while testing systems refer to hiring policies used by employers that require prospective employees to pass certain intelligence tests in order to be considered for employment. *See Quarles*, 279 F. Supp. at 512–13; *United Papermakers,* 416 F.2d at 983; Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971).

60. *See* Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701, 712 (2006).

use of seniority systems with a discriminatory effect to intentional discrimination.[61] The court stated "that the defendants . . . intentionally engaged in unlawful employment practices by discriminating on the ground of race against [the plaintiff], and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely *affect*[*ed*] the conditions of employment and opportunities for advancement of the class."[62] Just a year later, the United States Court of Appeals for the Fifth Circuit developed this concept more fully.

In *Local 189, United Papermakers v. United States*, the Fifth Circuit addressed the discriminatory effect of an employer's seniority system used for making promotion decisions.[63] The system awarded promotions to what were "whites-only" jobs on the basis of seniority attained in other formerly "whites-only" jobs, in effect barring African-American employees from receiving such promotions.[64] The court concluded that "[w]hen an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination, unless the incidents are limited to those that safety and efficiency require."[65] Despite the practice being facially neutral, the court determined that it had a discriminatory effect relating back to the days of lawful employment discrimination, thus violating Title VII.[66] With this recognition, the Fifth Circuit took an early step towards establishing disparate impact theory.[67] However, the Supreme Court did not officially sanction the use of effects-based liability under Title VII until two years after *United Papermakers*.[68]

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61. *Quarles*, 279 F. Supp. at 519.
62. *Id.* (emphasis added).
63. *United Papermakers*, 416 F.2d at 983.
64. *Id.*
65. *Id.* at 994.
66. *Id.* at 997.
67. Academics also played a significant role in this historic decision. Selmi, *supra* note 60, at 712. In fact, the court in *United Papermakers* relied heavily on two articles published in the *Harvard Law Review*. In 1969, two well-known legal scholars argued that employers' use of test scores and seniority to make hiring and promotion decisions was unlawful discrimination under Title VII of the Civil Rights Act of 1964. *See generally* Cooper & Sobol, *supra* note 58. Similarly, student commentators contended in another article that facially neutral seniority systems have a discriminatory effect on African-Americans and that Title VII should provide a remedy. *See generally* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, *supra* note 58.
68. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

2. Supreme Court Approval of Disparate Impact

In 1971, the Supreme Court approved disparate impact liability with its decision in *Griggs v. Duke Power Co*.[69] In *Griggs*, African-American plaintiffs challenged Duke Power Company's requirement that employees have a high school education and pass an intelligence test to obtain employment in any department other than labor.[70] Reversing the district and appellate court decisions, which held for the employer on the grounds that there was "no showing of discriminatory purpose,"[71] the Supreme Court found that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[72] The Court further stated that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[73]

With this interpretation of Title VII, the Supreme Court established the disparate impact theory and opened up employers to greater Title VII liability.[74] Yet, the Court chose to narrowly tailor its holding by stating that "[i]f an employment practice which operates to exclude Negroes *cannot be shown to be related to job performance*, the practice is prohibited."[75] Consequently, disparate impact claims only survived if the employer's practice proved unrelated to the job in question.[76] Although the *Griggs* decision now stands out as a landmark in civil rights law, practically speaking, it provided little interruption to the status quo of the time because courts readily accepted employers' justifications for their discriminatory employment practices.[77] This trend continued: "By the end of the theory's first decade, the Court had rejected more challenges than it had accepted . . . . A theory that burst onto the scene in 1971 ended its first decade with a whimper . . . [and] the two ensuing decades simply confirmed the theory's limited reach . . . ."[78]

The Court's next key disparate impact decision was *Wards Cove Packing Co. v. Atonio*, where the Supreme Court lessened the

69. *Id.*
70. *Id.* at 427.
71. *Id.* at 428.
72. *Id.* at 431.
73. *Id.* at 432 (emphasis added).
74. Selmi, *supra* note 60, at 708.
75. *Griggs*, 401 U.S. at 431 (emphasis added).
76. Selmi, *supra* note 60, at 721.
77. *Id.* at 724.
78. *Id.* at 733–34.

employer's burden even further.[79] The Court held that employers "need not show that their job qualifications were justified by business necessity in the strictest sense."[80] Rather, the Court concluded that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[81] In addition to the weak substantive interpretation of business necessity, the Court also placed the procedural burden of persuasion on the plaintiff to disprove business necessity.[82] The Court's decision emphatically reaffirmed the employer-friendly nature of the disparate impact standard.

After *Wards Cove*, the standard for analyzing Title VII disparate impact claims placed the initial burden on the employee to make out a prima facie case.[83] The employer could then justify its practice by showing that it significantly served a legitimate employment goal, but the employer bore only the burden of production, not the burden of persuasion.[84] The employee could only overcome the employer's justification by persuading the fact-finder that less-discriminatory alternatives existed.[85] Critics of *Wards Cove* believed that the Court's interpretation of the disparate impact standard undermined the theory's effectiveness.[86]

With *Wards Cove* and other Supreme Court judgments "threaten[ing] to eviscerate the *Griggs* decision,"[87] Congress responded by amending Title VII to codify the disparate impact theory and the appropriate burdens of proof in the Civil Rights Act of 1991.[88] With the Civil Rights Act of 1991, Congress narrowed the definition of business necessity,[89] and clearly put the burden of persuasion on the employer to prove business necessity.[90] However,

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79. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); *see also* Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1483 (1996).

80. Spiropoulos, *supra* note 79, at 1501; *Wards Cove Packing Co.*, 490 U.S. at 659 ("[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business . . . .").

81. *Wards Cove Packing Co.*, 490 U.S. at 659.

82. *Id.*

83. *Id.* at 657.

84. *Id.* at 659.

85. *Id.* at 659–60.

86. Spiropoulos, *supra* note 79, at 1503–04.

87. Selmi, *supra* note 60, at 703.

88. 42 U.S.C. § 2000e-2 (2012).

89. However, the amendment's definition of business necessity is quite ambiguous, stating that to present a viable defense the employer must demonstrate that "the challenged practice is job related for the position in question and consistent with business necessity." *Id.* § 2000e-2(k)(1)(A)(i).

90. *Id.*

a precise definition of "business necessity" continues to elude courts.[91]

D. The Development of Disparate Impact in the Fair Housing Context

Just a year after the Court's decision in *Griggs*, it took on another civil rights case that would significantly influence the development of disparate impact theory. This time, though, the case arose under Title VIII of the Civil Rights Act of 1968—the Fair Housing Act.[92] In *Trafficante v. Metropolitan Life Insurance Co.*, the Supreme Court relied on Title VII jurisprudence to interpret the FHA, setting an important precedent.[93] The case arose when two tenants of a San Francisco apartment complex filed suit against their landlord under the FHA for discrimination against nonwhites in the rental process.[94] Both the district court and the court of appeals held that the plaintiffs lacked standing because they were not the focus of the discriminatory housing practice.[95] However, the Supreme Court reversed and remanded on the grounds that Congress intended standing under the FHA, like standing under Title VII, to extend "as broadly as is permitted by Article III of the Constitution."[96] The ultimate takeaways from *Trafficante* are that the FHA's language is "broad and inclusive"—a phrase that courts still cite today—and that courts should interpret the Act analogously to Title VII.[97]

However, analogies to Title VII's disparate impact theory did not begin to take hold until 1974. In that year, for the first time, a federal appellate court found a violation of the FHA based on discriminatory effects.[98] In *United States v. City of Black Jack, Missouri*, the Eighth Circuit considered whether the city of Black Jack's zoning ordinance, which prohibited the construction of any

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91. *See, e.g.*, El v. Se. Pa. Transp. Auth., 479 F.3d 232, 239–42 (3d Cir. 2007).

92. 42 U.S.C. §§ 3601–3631 (2012).

93. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

94. The plaintiffs alleged that the complex's discrimination against nonwhites in the rental process injured them by depriving them of the social benefits of living in an integrated community, by depriving them of business and professional advantages, and by causing embarrassment and stigmatization as residents of a "white ghetto." *Id.* at 207–08.

95. *Id.* at 208.

96. *Id.* at 209 (quoting Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971)).

97. *Id.*

98. *See generally* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

new multiple-family dwellings, violated the FHA.[99] Specifically, the court examined whether the ordinance "operated to preclude construction of a low to moderate income integrated townhouse development known as Park View Heights," which was designed to provide "alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis."[100] The United States alleged in its complaint that the ordinance violated the FHA by denying persons housing on the basis of race and by interfering with individuals' rights to equal housing opportunities.[101] In its analysis, the court clarified how a plaintiff can make a prima facie case under the FHA by stating that the plaintiff must simply show that the defendant's actions actually or predictably result in a discriminatory effect.[102] With this statement and its final judgment in favor of the plaintiffs,[103] the Eighth Circuit paved the way for disparate impact to enter the fair housing world.

II. DISPARATE IMPACT TODAY: A PROPOSAL TO RESOLVE THE THEORY'S UNCERTAIN FUTURE UNDER THE FHA

Since the *Black Jack* decision, 40 years of litigation have supported the belief that the FHA includes a disparate impact standard.[104] All 11 circuits that have considered the issue have found accordingly.[105] The Supreme Court has yet to speak on the issue,[106] but the Court appears destined to eliminate disparate impact theory from fair housing law.[107]

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99. *Id.* at 1181.

100. *Id.* at 1181–82. At the time, African-Americans comprised approximately two-thirds of St. Louis's population. *Id.* at 1183. Conversely, African-Americans comprised only one to two percent of Black Jack's population. *Id.*

101. *Id.* at 1181.

102. *Id.* at 1184.

103. *Id.* at 1187–88.

104. ROBERT G. SCHWEMM & SARA K. PRATT, NAT'L FAIR HOUS. ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 3 (Dec. 1, 2009), *available at* http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf, archived at http://perma.cc/N5L8-FGWM.

105. *See supra* note 28.

106. *See* 2922 Sherman Ave. Tenants' Ass'n v. District of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006) ("The Supreme Court has yet to consider the availability of disparate impact claims under the FHA."); SCHWEMM & PRATT, *supra* note 104, at 4.

107. *See infra* Part II.A.

A. The Current State of Disparate Impact Under the FHA

The Court in recent years has issued opinions dealing with disparate impact claims under other civil rights statutes, specifying that each statute's coverage of such claims must be determined on the basis of that statute's particular text and purposes.[108] However, one recent case signaled even greater concerns for the future of the disparate impact theory as a whole.

1. A Sign of Things to Come: Ricci v. DeStefano

In 2009, the Supreme Court addressed the perceived clash of disparate impact and disparate treatment and how that clash may reveal constitutional concerns.[109] In *Ricci v. DeStefano*, white and Hispanic firefighters sued the city of New Haven, Connecticut, for refusing to certify the results of a promotional exam.[110] The exam, taken by 118 New Haven firefighters for the chance at a promotion to the rank of lieutenant or captain, resulted in white firefighters outperforming minority firefighters.[111] In response, the mayor and other politicians opened up a public debate about the test results that quickly turned hostile.[112] Some firefighters argued that the test was discriminatory and that the results should be thrown out, while others demanded that the results be used for making promotions because the test was fair and neutral.[113] Both sides threatened lawsuits.[114] Ultimately, the city threw the results out because it feared that, if followed, the results would have a disparate impact on minority firefighters.[115] The white and Hispanic firefighters who would have received promotions responded by filing suit under Title VII, alleging that the city's decision not to use the results for making promotions constituted intentional discrimination.[116] The Supreme Court agreed, holding that an employer must have a "strong basis in evidence" for believing it will be subject to disparate impact liability before it can engage in intentional discrimination.[117]

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108. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,463 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).
109. *See generally* Ricci v. DeStefano, 557 U.S. 557 (2009).
110. *Id.* at 557.
111. *Id.* at 562.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 563.
116. *Id.* at 562–63.
117. *Id.* at 585. The Court in *Ricci* held that fear of litigation alone was insufficient to form a strong basis in evidence that an employer would be subject

In concurrence, Justice Scalia remarked that the majority simply "postpon[ed] the evil day" when the Court will have to answer whether disparate impact is consistent with the Equal Protection Clause of the Constitution.[118] Without directly stating his take on the constitutional issue, Scalia indicated that the theory's days may be numbered. However, the Court's preference to avoid constitutional questions when possible,[119] in conjunction with the fact that the FHA's language does not explicitly include disparate impact claims,[120] indicates that the Court will likely address the viability of FHA disparate impact on statutory grounds. In other words, the Court can dispose of this question by simply stating that the FHA's language does not support a disparate impact cause of action, which will allow it to answer the FHA disparate impact question without triggering far-reaching consequences within Equal Protection doctrine. Indeed, the Court's approach in three recent FHA disparate impact cases shows that this Court will likely strike down disparate impact claims under the FHA—if it gets the chance to do so.[121]

2. An Opportunity Lost: Magner v. Gallagher

In 2011, the Supreme Court for the first time accepted an opportunity to review the applicability of disparate impact under the FHA in the case of *Magner v. Gallagher*.[122] The case arose when landlords in the city of St. Paul, Minnesota, filed suit against the city

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to disparate impact liability, *id.* at 592, but the standard's precise nature is not altogether clear as *Ricci* was the first case in which the Court used the "strong basis in evidence" language outside of the Equal Protection context. *See* Herman N. Johnson, Jr., *The Evolving Strong-Basis-In-Evidence Standard*, 32 BERKELEY J. EMP. & LAB. L. 347, 349 (2011). However, Professor Herman N. Johnson, Jr., has persuasively argued that the Court's relocation of the standard to Title VII doctrine marks the transformation of "strong basis in evidence" from a burden of persuasion to a standard of proof falling below the "preponderance of the evidence" standard. *See generally id.*

118. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

119. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.").

120. 42 U.S.C. §§ 3604–3607 (2012).

121. It is likely that civil rights advocates will push for a settlement in the *Inclusive Communities* case that now sits before the Court as they did in the previous two cases in which the Court granted certiorari. *See infra* Part II.A.2–4.

122. Magner v. Gallagher, 132 S. Ct. 548 (2011).

for its aggressive enforcement of the housing codes.[123] The landlords sued under the FHA, arguing that the city's practices significantly diminished the supply of affordable housing, which in turn disproportionately affected low-income minorities.[124] The district court granted summary judgment in favor of the defendants, but the Court of Appeals for the Eighth Circuit reversed after analyzing the claims under the burden-shifting approach.[125] The city then petitioned the Supreme Court for a writ of certiorari on two issues: (1) whether disparate impact claims are cognizable under the FHA; and (2) if such claims are cognizable, whether they should be analyzed under the burden shifting approach, under the balancing test, under a hybrid approach, or by some other test.[126]

The Supreme Court granted certiorari but never had the opportunity to decide the case.[127] Both parties agreed to drop the petition after the Department of Justice and civil rights advocates convinced the city of St. Paul that a Supreme Court ruling on the case could "substantially undermine civil rights enforcement throughout the nation."[128] The city's withdrawal left unanswered the question of whether the FHA supports disparate impact, a question that a small town in New Jersey gave the Court the chance to answer just a short time later.

3. A Repeat Performance: Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.

The Court's next chance to answer the disparate impact question arose out of the small, seemingly sedate town of Mount

123. Gallagher v. Magner, 619 F.3d 823, 828 (8th Cir. 2010).
124. *Id.* at 833.
125. *Id.* at 845.
126. Brief for the Petitioners at i, Magner v. Gallagher, 132 S. Ct. 1306 (2012) (No. 10-1032); John W. McGee, *Mt. Holly v. Mt. Holley Gardens: Disparate Impact and the Fair Housing Act*, 41 REAL EST. L.J. 429, 447–48 (2013).
127. Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (2013).
128. *City of St. Paul Seeks to Dismiss United States Supreme Court Case Magner v. Gallagher*, SAINT PAUL MINNESOTA (Feb. 10, 2012), http://www.stpaul.gov/index.aspx?NID=4874, archived at http://perma.cc/LPL3-BCQ4. *See also* Denniston, *supra* note 33; Daniel Fisher, *Supreme Court Takes Up Challenge to Disparate-Impact Discrimination Theory*, FORBES (June 17, 2013, 11:15 AM), http://www.forbes.com/sites/danielfisher/2013/06/17/supreme-court-takes-up-challenge-to-disparate-impact-discrimination-theory/, archived at http://perma.cc/8NF4-9UAM.

Holly, New Jersey.[129] There, the town's only predominantly black and Hispanic area,[130] a neighborhood known as the Gardens, was plagued by crime, blight, and overcrowding.[131] In response, the neighborhood's residents organized a number of efforts in concert with local authorities to improve conditions,[132] but the Township grew tired of the cooperative approach.[133] By 2002, the Township settled on a "destroy-and-displace" plan,[134] the ultimate goal of which was to construct a brand new development with 520 townhomes and apartments.[135] Because the Township's redevelopment plan had the effect of displacing nearly the entirety of the Gardens' former residents and eliminating the town's only neighborhood made up primarily of minority inhabitants,[136] the citizens of Mount Holly Gardens filed suit alleging a violation of the FHA under the disparate impact theory.[137]

The district court dismissed the plaintiffs' claim on summary judgment, but the Third Circuit reversed, holding that the lower court employed the wrong standard and that the plaintiffs' statistical evidence sufficiently supported a prima facie case of

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129. Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 377 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013).

130. McGee, *supra* note 126, at 449.

131. *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 378.

132. Brief in Opposition for Mt. Holly Gardens Respondents at 4, Twp. of Mount Holly v. Mt. Holly Citizens in Action, Inc., 134 S. Ct. 636 (2012) (No. 11-1507).

133. *Id.*

134. *Id.* at 6.

135. *Id.* Of those 520 new residences, only 56 were designated to provide affordable housing—the cost of a new home was "well outside the range of affordability for a significant portion of the African-American and Hispanic residents of the Township." *Id.* at 8. Moreover, only 11 existing garden residents would be offered priority status. *Id.* at 6.

136. The Gardens originally had over 300 homes and now only 70 remain under the private ownership of Gardens residents. *Id.* at 1. Additionally, even though the Township paid for 62 families to relocate, only 20 of them were able to remain in Mount Holly. *Id.* at 8. The looming elimination of the Gardens threatened to significantly diminish the town's minority population by removing 27.2% of African-American residents and 30.9% of Hispanic residents, thus drastically increasing the proportion of Caucasians in Mount Holly from 65.6% to 75.9%. *Compare id.* at 3, *with 2010 Census Profile of General Demographic Characteristics for Township of Mount Holly, NJ*, http://lwd.dol.state.nj.us/labor/lpa/census/2010/dp/dp1_bur/mountholly1.pdf, archived at http://perma.cc/TZ5-4RX7 (last visited Jan. 21, 2014). Demographic characteristics of the Gardens taken from Respondents' Brief divided by the demographic characteristics for the town as a whole taken from the state website reveal the cited statistics. *Id.*

137. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 377 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013).

disparate impact.[138] The court then remanded for further findings on whether the town demonstrated that no less-discriminatory alternatives existed.[139] After the town appealed the Third Circuit's ruling, the Supreme Court granted certiorari to determine whether disparate impact claims are even cognizable under the FHA, but declined to resolve the circuit split over the appropriate standard.[140] However, as in *Magner*, the parties agreed to settle their dispute out of court just weeks before oral argument was set to take place.[141] The reason for the settlement, again as in *Magner*, was a push from civil rights advocates to keep the issue out of the Court's hands because of the Court's perceived opposition to the disparate impact theory.[142] Although fair housing advocates' methods for ensuring disparate impact will likely prove ineffective in the end, their perception that the Court will sink the disparate impact theory in fair housing law appears valid.[143]

4. Round Three, the Potential Knockout Blow: Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.

In a move that only reinforces the perception that disparate impact under the FHA is doomed, the Court has granted certiorari to once again consider the validity of disparate impact claims under the FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[144] The case arose when the Inclusive Communities Project (ICP), a nonprofit organization that assists "low-income, predominantly African-

138. *Id.*

139. *Id.* at 385–86.

140. Wendy M. Garbers, Angela E. Kleine, & Thomas J. Noto, *Supreme Court Takes Up Landmark Disparate Impact Case, Again, Over U.S. Objections*, MORRISON FOERSTER (June 19, 2013), http://www.mofo.com/files/Uploads/Images/130619-SCOTUS-Disparate-Impact.pdf, archived at http://perma.cc/DLN5-3WHM.

141. Kaplinsky, *supra* note 32.

142. Brian J. Connolly, *U.S. Supreme Court Fair Housing Case Settles, Disparate Impact Stays Put For Now*, ROCKY MOUNTAIN REAL EST. LAW (Nov. 14, 2013), http://www.rockymountainrealestatelaw.com/us-supreme-court-fair-housing-act-case-settles-disparate-impact-stays-put-for-now/, archived at http://perma.cc/NSX6-SSZX ("Fair housing advocates, including the Obama administration, have sought to prevent the FHA disparate impact issue from reaching the Supreme Court . . . ."). *See supra* Part II.A.1.

143. *See supra* Part II.A.1.

144. Inclusive Cmtys. Project, Inc. v. Tex. Dep't Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014), *cert granted*, http://www.supremecourt.gov/orders/courtorders/100214zr_086c.pdf, archived at http://perma.cc/EB5B-55VL (U.S. Oct. 2, 2014) (No. 13-1371).

American families . . . in finding affordable housing in predominantly Caucasian, suburban neighborhoods" around Dallas, filed suit against the Texas Department of Housing and Community Affairs (TDHCA).[145] ICP alleged that TDHCA violated the FHA under both disparate treatment theory and disparate impact theory by distributing Low Income Housing Tax Credits (LIHTC) in a discriminatory manner.[146] Specifically, "ICP alleged that [TDHCA was] disproportionately approving tax credit units in minority-concentrated neighborhoods and disproportionately disapproving tax credit units in predominately Caucasian neighborhoods, thereby creating a concentration of the units in minority areas, a lack of units in other areas, and maintaining and perpetuating segregated housing patterns."[147]

The district court found that ICP failed to meet its burden of establishing intentional discrimination, but held that ICP successfully proved a violation of the FHA based on disparate impact.[148] The defendants appealed to the United States Court of Appeals for the Fifth Circuit, where the appellate court addressed only whether the lower court was correct in finding a violation of the FHA based on disparate impact.[149] Acknowledging the viability of disparate impact under the FHA, the Fifth Circuit began by explicitly adopting a three-step burden-shifting standard for analyzing disparate impact claims, the same standard that was recently adopted by the Department of Housing and Urban Development (HUD)—the agency responsible for administering and enforcing the FHA.[150] After adopting the burden-shifting approach, the court then remanded the case so that the district court could apply the correct legal standard.[151] However, after the defendants appealed the Fifth Circuit's decision, the Supreme Court granted certiorari on whether disparate impact claims are cognizable under the FHA; and again as in *Mt. Holly*, the Court ignored the second issue presented as to what standard should apply.[152]

The fact that the Court granted certiorari in *Mt. Holly* just two years after losing *Magner*, and then granted certiorari in *Inclusive*

145. *Id.* at 277–78.
146. *See id.* at 278–79.
147. *Id.* at 278.
148. *See id.* at 279–80.
149. *See id.* at 280.
150. *See id.* at 282.
151. *See id.* at 283.
152. *See generally id.*; *Orders in Pending Cases*, U.S. SUPREME COURT (Oct. 2, 2014), http://www.supremecourt.gov/orders/courtorders/100214zr_086c.pdf, archived at http://perma.cc/EB5B-55VL (granting certiorari in No. 13-1371).

Communities less than a year after losing *Mt. Holly*, reveals its burning desire to address disparate impact theory under the FHA. However, the only major dispute between the circuit courts is the appropriate standard for adjudicating disparate impact cases,[153] not whether the FHA supports disparate impact claims.[154] Yet, the Court in *Inclusive Communities* and *Mt. Holly* declined to grant certiorari on that issue, instead only considering the issue of whether the FHA supports the theory at all.[155] The Court's decision to refuse review of the circuit split over the proper standard indicates that the Court found it unnecessary to resolve, suggesting that the impetus for granting certiorari was to end disparate impact's run under the FHA. One could contend that such an outcome is not inevitable because it only takes four votes to grant certiorari but five to garner a majority opinion.[156] Nevertheless, the Supreme Court's recent trend of reversing the vast majority of cases on which it grants certiorari supports the prediction that this Court will strike down disparate impact under the FHA—an unacceptable result for those interested in guaranteeing fair housing for all.

"The FHA's purpose is to ensure fair housing for all individuals throughout the United States and to end discrimination against protected classes of persons based on prejudice, stereotypes or ignorance in the provision of housing."[157] If the Supreme Court were to read disparate impact out of the FHA, it would make achieving this goal next to impossible because of the difficulty of proving intentional discrimination.[158] With disparate impact eliminated from the FHA, the only enforcement tool left to wronged individuals would be a claim of disparate treatment, which has

153. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

154. *See supra* note 28.

155. Inclusive Cmtys. Project, Inc. v. Tex. Dep't Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014), *cert granted*, http://www.supremecourt.gov/orders/courtorders/100214zr_086c.pdf, archived at http://perma.cc/EB5B-55VL (U.S. Oct. 2, 2014) (No. 13-1371); Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, 133 S. Ct. 2824 (2013). *See* Garbers et al., *supra* note 140.

156. *See* Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—or is it Five?*, 36 SUFFOLK U. L. REV. 1, 1–3 (2002).

157. Katherine Brinson, *Justifying Discrimination: How the Ninth Circuit Circumvented the Intent of the Fair Housing Act*, 38 GOLDEN GATE U. L. REV. 489, 492 (2008) (citing 42 U.S.C. § 3601 (1968)). *See also* Bangerter v. Orem City Corp., 46 F.3d 1491, 1504 (10th Cir. 1995) (discussing the purpose of the Fair Housing Act amendments to extend the same protections to individuals with disabilities).

158. *See infra* note 159.

limited effectiveness. As courts, scholars, and the drafters of the FHA have noted, "explicit discriminatory intent is exceptionally difficult to prove,"[159] thus making disparate impact all the more important. Not only would such a decision put the FHA's goals out of reach, but it would also contradict the intent of the FHA's drafters and initial supporters in Congress.[160] For instance, Senator Walter Mondale, the Act's principal sponsor, stated that "it seems only fair, and is constitutional, that Congress should now pass a fair housing act *to undo the effects*" of past discrimination.[161]

Disparate impact has significant potential as an "evidentiary dragnet" for holding entities and individuals involved in housing transactions liable when they cloak their discriminatory intent under a veil of legitimacy.[162] Moreover, it provides a mechanism for fighting

159. John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 171 n.165 (2002) (citing United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 783 (N.D. Miss. 1972) ("The Court recognizes that 'most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro Race.'")); Fowler v. Borough of Westville, 97 F. Supp. 2d 602, 612 (D.N.J. 2000) (quoting Horizon Hous. Dev. Serv., Inc. v. Twp. of Upper Southhampton, 804 F. Supp. 683, 696 (E.D. Pa. 1992)) ("[I]t is unusual that a [FHA defendant] will openly reveal that he or she acted on the basis of discriminatory intent."); SCHWEMM & PRATT, *supra* note 104, at 11 ("The FHA's legislative history also demonstrates that Congress was aware of the difficulty of proving discriminatory intent and, because of this difficulty, allowed other forms of proof. Senator Baker introduced a floor amendment that would have exempted from liability any homeowner who engaged a real estate agent 'without indicating any preference, limitation or discrimination based on race . . . , or an intention to make any such preference, limitation or discrimination.' The Baker amendment would have made such homeowners liable only if they intentionally discriminated. A number of the bill's supporters objected that the amendment would undermine Congress's purpose by making proof of discrimination difficult in all but the most blatant cases. The Baker amendment was defeated." (citations omitted)).

160. SCHWEMM & PRATT, *supra* note 104, at 11 ("Proponents of the FHA emphasized that the facially neutral practices of private and public actors were a principal cause of residential segregation, which the Act aimed to eliminate. One of the Act's leading supporters, Senator Brooke, noted that African Americans could not move to better neighborhoods because they were 'surrounded by a pattern of discrimination based on individual prejudice, often *institutionalized* by business and industry, and Government *practices*.' Senator Mondale, the Act's principal sponsor, explained that after the Supreme Court had prohibited explicitly racial zoning laws in 1917, '[l]ocal ordinances *with the same effect*, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted.'" (citations omitted) (quoting 114 CONG REC. 2526, 2669 (1968))).

161. *Id.* (emphasis added).

162. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 520 (2003) (Under the view of disparate impact as an evidentiary dragnet for deliberate discrimination, the "disparate impact

segregation by prohibiting housing practices that inadvertently have a disproportionate effect on minority populations and perpetuate residential segregation.[163] An accurate understanding of the policy underlying the FHA and a broad reading of its language command the inclusion of a disparate impact cause of action.[164]

B. A Call to Amend the FHA

Notable disparate impact scholars Robert G. Schwemm and Sara K. Pratt have previously proposed administrative regulations as a means for guaranteeing disparate impact under the FHA.[165] However, HUD has since employed that approach, and its regulations are already being challenged in court.[166] The Supreme Court again has the opportunity to address disparate impact under the FHA, and with its current ideological composition, an administrative regulation is unlikely to withstand the Court's apparent distaste for disparate impact theory.[167] Accordingly, those interested in guaranteeing a future for disparate impact in fair housing must target their efforts towards Congress and persuade it to codify disparate impact by amending the FHA, no matter the result in *Inclusive Communities*. Even if advocates pull this case away from the Court as they have in the past, Congress still must act because the Court appears determined to speak on this issue. And if the Court ends up striking down disparate impact under the FHA on this go-around, then Congress must respond in order to ensure the Act's effectiveness is rooting out discriminatory practices.

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doctrine is a prophylactic measure that is necessary because deliberate discrimination can be difficult to prove.").

163. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*, *supra* note 17, at 1144–45.

164. *See supra* note 11 and accompanying text.

165. *See generally* SCHWEMM & PRATT, *supra* note 104.

166. Deepak Gupta, *Town Council to Meet on Settlement in Mount Holly Tonight*, PUB. CITIZEN CONSUMER LAW AND POL'Y BLOG (Nov. 6, 2013), *available at* http://www.pubcit.typepad.com/clpblog/2013/11/town-council-to-meet-on-settlement-in-mount-holly-tonight.html, archived at http://perma.cc/9UVD-F58V (noting that a settlement would shift focus to *American Insurance Ass'n v. HUD*, where HUD's regulation is being challenged in the United States District Court for the District of Columbia).

167. The Court's recent approach towards disparate impact under the FHA leads to the supposition that the Court does not believe the FHA's language supports disparate impact, meaning that an administrative regulation would likely receive no deference. *See supra* Part II.A.; Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

Just as it did in response to *Wards Cove* in the employment context,[168] Congress should respond to the Supreme Court by revising the FHA to explicitly support disparate impact claims.

First, Congress needs to include within the FHA language that explicitly provides for disparate impact liability. Luckily for the legislature, experts in the field have already done much of the legwork. Schwemm and Pratt's proposal in *Disparate Impact Under the Fair Housing Act: A Proposed Approach* includes a model regulation based on language in the Civil Rights Act of 1991.[169] Although they intended their recommendation for use by HUD, the proposed language works effectively as an amendment to the FHA. Schwemm and Pratt's articulation provides not only explicit recognition of a disparate impact cause of action but also relevant definitions required for its interpretation.[170] By adding such language into the FHA, Congress can clearly establish

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168. *See supra* notes 87–90 and accompanying text.

169. The text of the model regulation reads as follows:

> Unjustified discriminatory impact: Prohibited actions for purposes of this subsection include employing any practice that has an adverse impact based on race, color, religion, sex, familial status, national origin, or handicap unless that practice is shown by the party employing it to have a legally sufficient justification.
>
> For purposes of this subsection:
>
> –"practice" includes any practice, policy, procedure, process, standard, elements of practices, policies, procedures, processes, or standards that are not capable of being separated for analysis, and any other action that is intended to evaluate or affect a group of persons.
>
> –"adverse impact" means a substantially different rate of selection which works to the disadvantage of members of a race, sex, ethnic group, religion, [etc.]. The term "substantially" means the same as it has been interpreted in prior judicial and HUD administrative decisions under this Act and in prior judicial decisions and administrative regulations under Title VII.
>
> –a "legally sufficient justification" is one that (1) furthers one or more of the user's legitimate, non-discriminatory interests; and (2) cannot be served by an alternative practice with a less discriminatory impact.
>
> A "legally sufficient justification" must:
>
> -bear a manifest relationship to the practice that is challenged;
>
> -have a significant correlation with important elements of the operation of the housing opportunity or business;
>
> -involve a matter of substantial concern to the operation of the housing opportunity or business; and, be more effective in accomplishing its purpose than a less discriminatory alternative.
>
> A "legal[ly] sufficient justification" may not:
>
> -be hypothetical, speculative, or insubstantial; or
>
> -be facially discriminatory or otherwise reflect an intent to discriminate on a prohibited basis.

SCHWEMM & PRATT, *supra* note 104, at 28–29.

170. *See id.*

disparate impact under the FHA. The next question is where to incorporate such language into the FHA's structure.

Schwemm and Pratt's proposal again provides guidance. Their proposed approach discusses options for the placement of disparate impact language within HUD's current fair housing regulations.[171] Although HUD's regulations differ from the FHA, Schwemm and Pratt's recommendations still prove useful. One of their suggestions is to include the disparate impact language in "those parts of the regulations providing overall coverage of the FHA's substantive prohibitions."[172] Accordingly, Congress can look to include the disparate impact provision within the substantive sections of the FHA that provide overall coverage, which include sections 3604, 3605, and 3606.[173] Adding the disparate impact language to these sections would clearly establish that public and private entities engaged in housing transactions are subject to liability for any practice with a discriminatory effect.

Some may contend that an amendment to the FHA is premature given the recent success of fair housing advocates in facilitating settlements. The argument goes: If advocates can push for settlements in *Inclusive Communities* and future cases, then there remains no risk to disparate impact under the FHA. However, such an approach is shortsighted. It allows the effectiveness of the FHA to dwindle as defendants are now keenly aware that fair housing advocates and the Department of Justice would rather encourage settlements than let the Court decide the issue.[174]

This knowledge gives defendants the upper hand in negotiations. Defendants can effectively hold the threat of moving forward in litigation over plaintiffs to obtain one-sided settlement terms. Essentially, some defendants will be able to escape liability because of plaintiffs' and amici's fear of the Court striking down disparate impact. Of course, critics of this proposal can argue that this is the nature of litigation and settlements—the party that fears it will lose at the next level has less leverage in negotiations. This may be true, but ideally, interested parties would look to the Court for clarification of the law rather than fearing such pronouncements. Such a state of affairs undermines the purpose of the legal system—to fairly and justly adjudicate cases and controversies—by permitting fear of the judiciary to dictate outcomes rather than truth, justice, and equity.

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171. *Id.*
172. *Id.* at 29.
173. *See* 42 U.S.C. §§ 3604–3606 (2012).
174. *See* Connolly, *supra* note 142.

However, disparate impact in its current form under the FHA is not flawless. Thus far, it has proven ineffective in eradicating housing discrimination.[175] This Comment contends that disparate impact's failures to date are not the result of any inherent inadequacy but rather a lack of clarity regarding its use under the FHA. Accordingly, when Congress amends the FHA to explicitly include disparate impact claims, it must also resolve the circuit split over the appropriate analytical standard and include a single standard in the amendment. That inevitably raises the question: What standard should Congress adopt?

III. DISSECTING DISPARATE IMPACT UNDER THE FHA: THE STANDARD DEBATE

The disparate impact theory has proven to be a generally ineffective tool for FHA plaintiffs over the past forty years.[176] FHA plaintiffs asserting disparate impact claims have been unsuccessful in roughly 80% of the cases that reach the federal circuit courts.[177] The fact that approximately 4,000,000 instances of housing discrimination occur annually,[178] yet only 18 FHA plaintiffs (as of 2013) have succeeded on their disparate impact claims at the federal appellate level, demonstrates that the theory is failing to root out discriminatory housing practices.[179]

Stacy E. Seicshnaydre, a professor at Tulane University Law School and a frequent commentator on disparate impact under the FHA, suggests that one primary reason for disparate impact's ineffectiveness under the FHA is that plaintiffs typically use disparate impact as a "Plan B" to disparate treatment claims, thus not fully developing an appropriate disparate impact claim.[180] A logical explanation for plaintiffs' misuse of the disparate impact theory is the lack of clarity resulting from inconsistent standards among the circuit courts, which other scholars have acknowledged as the underlying cause of the theory's deficiencies.[181] The absence of coherent standards for proving disparate impact liability has the consequence of discouraging potential plaintiffs,[182] and perhaps

175. *See supra* notes 14, 20 and accompanying text.
176. *See supra* note 20.
177. *Id.*
178. *See supra* note 14 and accompanying text.
179. *See supra* note 20.
180. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*, *supra* note 17, at 1148–49; Seicshnaydre, *Is Disparate Impact Having Any Impact?*, *supra* note 20, at 393.
181. *See supra* note 21 and accompanying text.
182. *See* Peresie, *supra* note 21, at 774–75.

their lawyers as well. Moreover, it prevents public and private entities engaged in housing transactions from truly understanding their obligations under the law.[183] A clear and predictable standard would clarify the rights and responsibilities of persons seeking housing and persons or entities engaged in housing transactions, thus reducing litigation.[184] When public and private entities engaged in housing transactions understand their obligations, they will, in most cases, comply to avoid costly litigation.[185] As these entities comply with the FHA, the number of discriminatory housing practices should decrease and segregation should begin to subside. Consequently, a clear and predictable analytical standard is a necessity for the effective enforcement of the FHA.

Although Seicshnaydre contends that disparate impact's failure under the FHA requires elimination of all considerations of intent in disparate impact,[186] the more appropriate response, in light of the importance of disparate impact in smoking out well-disguised discriminatory intent,[187] is to clarify the disparate impact standard under the FHA and explicitly define when evidence of intent can be relevant to disparate impact claims. Unfortunately, none of the standards currently employed by the circuit courts prove adequate in this endeavor.

A. Examining the Current Standards Employed by the Circuit Courts: Pros and Cons

Although all circuit courts that have addressed the issue agree that the FHA allows disparate impact claims, the circuit courts

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183. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,480 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

184. *Id.*

185. *See* Brit T. Brown, *Common Sense Tips for Avoiding Litigation*, BEIRNE, MAYNARD & PARSONS, L.L.P. (Apr. 30, 2003), http://www.bmpllp.com/publications/37-common-sense-tips-avoiding-litigation, archived at http://perma.cc/879V-BDDD.

186. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*, *supra* note 17, at 1144.

187. Rutherglen, *supra* note 18, at 1299; Primus, *supra* note 162, at 520. *See also* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979) ("[C]lever men may easily conceal their motivations . . . ."); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988) ("Often, such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied."); Rotem, *supra* note 21, at 1990 ("[O]ften intent to discriminate is difficult to prove.").

vary in how they analyze such claims.[188] For instance, HUD and a number of federal courts of appeals endorse a burden-shifting approach similar to that used in the employment context as the correct standard for analyzing FHA disparate impact claims.[189] Other circuits abandon burden-shifting altogether in favor of a balancing test,[190] while others have decided to merge the two.[191] Finally, one circuit court has utilized different tests based on whether the defendant is a public or private entity—using the burden-shifting approach for private defendants and the balancing test for public defendants.[192] As a result, courts in different regions of the country can reach different outcomes on similar sets of facts.[193] Additionally, entities engaged in housing transactions lack a clear guide for how to act in order to avoid litigation as they do not know under what circumstances they can justify housing procedures with a discriminatory effect.[194]

1. The Burden-Shifting Approach

The burden-shifting analysis closely mirrors the standard for employment discrimination outlined in the Civil Rights Act of

188. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

189. *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Tex. Dep't Hous. & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014), *cert granted*, http://www.supremecourt.gov/orders/courtorders/100214zr_086c.pdf, archived at http://perma.cc/EB5B-55VL (U.S. Oct. 2, 2014) (No. 13-1371); HUD v. Twinbrook Vill. Apts., Nos. 02-00-0256-8, 02-00-0257-8, 02-00-0258-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); HUD v. Mountain Side Mobile Estates P'ship, Nos. 08-92-0010-1, 08-92-0011-1, 1993 WL 367102, at *6 (HUD ALJ Sept. 20, 1993); *Huntington Branch*, 844 F.2d at 939; Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–50 (1st Cir. 2000).

190. *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982).

191. *See, e.g.*, Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 373 (6th Cir. 2007); Mountain Side Mobile Estates v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1252 (10th Cir. 1995).

192. *See, e.g.*, Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 n.5 (4th Cir. 1984).

193. *See* Eric W.M. Bain, Note, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1454–57 (2012) (demonstrating how the different circuits' standards can reach different results through the example of *Gallagher v. Magner*).

194. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,480 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100).

1991.[195] Under this analysis—also known as the *McDonnell-Douglas* framework[196]—the initial burden is on the plaintiff to provide statistical data demonstrating that the questioned practice has a disparate impact.[197] If the plaintiff can do so, the burden then shifts to the defendant to establish a justification for the action.[198] The defendant must show that it has a legitimate reason for its actions and that the practices employed bear a manifest relationship to that legitimate interest.[199] If the defendant can meet this burden, the burden then shifts back to the plaintiff to show that reasonable, less-discriminatory alternative means are available for accomplishing the same goal.[200]

This approach provides a clear and workable standard but fails from a policy standpoint. The policy concern with this formulation of the burden-shifting approach is the burden falling back onto the plaintiff after the defendant shows that it has a legitimate reason for its actions and that the practices employed bear a manifest relationship to that legitimate interest. Instead, the defendant should have to show that no less-discriminatory alternatives exist as a part of the second step of the analysis. Under this approach, the defendant would carry the burden of persuasion after the prima facie case is made.[201] Indeed, some courts already use this formulation of the burden-shifting approach.[202] In this analysis, the

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195. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988); Bain, *supra* note 193, at 1469.

196. Aka v. Wash. Hosp. Center, 156 F.3d 1284, 1289 (D.C. Cir. 1998).

197. Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003).

198. *Id.*

199. Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 384 (6th Cir. 2007) ("[T]he defendant 'must demonstrate that the proposed action has 'a manifest relationship' to the legitimate, non-discriminatory policy objectives . . . .'").

200. *Oti Kaga*, 342 F.3d at 883.

201. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988).

202. *See, e.g.*, Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 468 (3d Cir. 2002) (noting that the government must show that "no alternative would serve the interest with less discriminatory effect"); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146–49 (3d Cir. 1977) ("[T]he defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."); *Huntington Branch*, 844 F.2d at 939 ("[A] defendant must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available."); Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 322–23 (N.D. Tex. 2012), *rev'd*, 747 F.3d 275 (5th Cir. 2014), *cert granted*, http://www.supremecourt.gov/orders/courtorders/100214zr_086c.pdf, archived at http://perma.cc/EB5B-55VL. ("[D]efendants must prove two essential elements. First, they must prove that their interest is bona fide and

defendant bears the last two burdens—it must show that a legitimate interest justifies its actions and that less-discriminatory means do not exist.[203]

As the Second Circuit aptly noted in *Huntington Branch, NAACP v. Town of Huntington*, the three-step burden-shifting approach is an intent-based standard that is inapposite for disparate impact use.[204] Unlike disparate treatment, where the plaintiff must overcome the defendant's evidence of legitimate intent to prove a discriminatory intent, the lynchpin of disparate impact is the plaintiff's proof of a disproportionate effect on members of a protected class.[205] Plaintiffs bear this burden in the initial step, and everything that occurs afterwards is an attempt by the defendant to justify the discriminatory effect, analogous to an affirmative defense.[206] Typically, the burden of proof for an affirmative defense lies with the defendant,[207] and thus in disparate impact cases, the burden of proof for overcoming the existence of a discriminatory effect should also lie with the defendant. Consequently, a two-step approach corresponds more appropriately to disparate impact cases—the plaintiff provides statistical evidence of a practice's discriminatory effects, and then the defendant has the opportunity to overcome that evidence by showing that the practice has a manifest relationship to a legitimate interest and that less-discriminatory alternatives do not exist. One scholar in particular has lauded this approach, noting that it is "both fair and logical" for defendants to "shoulder[] the burden of proving the action taken was a necessity" as "[t]he plaintiff has the manageable burden of proving a positive—that the act has a disparate impact."[208] The two-step burden-shifting framework would provide a significant improvement; however, it still lacks an essential element: intent.

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legitimate. Second, they must prove there are no less discriminatory alternatives . . . .").

203. *See Huntington Branch*, 844 F.2d at 939.

204. *Id.* ("The *McDonnell Douglas* test . . . is an intent-based standard for disparate treatment cases inapposite to the disparate impact claim asserted here.").

205. *See* Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (explaining that Title VII prohibits practices that have a disparate impact or a "disproportionately adverse effect on minorities"); Jackson v. Okaloosa Cnty., 21 F.3d 1531, 1543 (11th Cir. 1994) ("[A] showing of a significant discriminatory effect suffices to demonstrate a violation of the Fair Housing Act.").

206. *See* 42 U.S.C. § 2000e-2(k) (2012).

207. *See* 9A AM. JUR. 2D *Pl. & Pr. Forms Evidence* § 128 (Westlaw 2014).

208. *See* Craig-Taylor, *supra* note 13, at 84.

2. The Relevance of Intent

The essential element missing from the burden-shifting standard is a mechanism for dealing with cases where the defendant has cloaked its discriminatory intent in actions bearing a manifest relationship to a legitimate interest. Disparate impact provides a tool for smoking out such well-hidden discriminatory intent that cannot be addressed by a disparate treatment claim.[209] The disparate impact standard therefore needs a mechanism for dealing with such cases.

Take for instance the case of *Affordable Housing Development Corp. v. City of Fresno*, where the Ninth Circuit affirmed a jury's denial of FHA liability when the City of Fresno declined to approve housing bonds for the construction of a low-income, multi-family apartment building known as Wellington Place,[210] which would have been the only low-income building in northwest Fresno and the only one outside of the inner city.[211] The City denied the application purportedly on the grounds that the building would bring down local property values and that there was a lack of need for the project.[212] Although the jury found that the City's denial had a disproportionate effect on low-income minorities, it determined (and the court of appeals agreed) that the City's reasons constituted a legitimate justification for the disproportionate effect on minorities and that less-discriminatory practices did not exist.[213] Based on these facts alone, this case appears to be a straightforward, appropriate decision based on the City's choice to protect its residents' property values. However, plaintiffs brought forth relevant evidence of discriminatory intent for their disparate treatment claim that should not have been ignored in the disparate impact context.[214]

Despite the Housing Authority's initial approval of the application, a newly elected councilman began attempts to kill the project soon after taking office.[215] These attempts included the councilman's distribution of flyers containing inflammatory statements telling residents to protest "Affordable Housing . . . in

209. *See supra* note 18 and accompanying text.
210. Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1188–89 (9th Cir. 2006).
211. Appellants A.H.D.C.'s and Ashwood Construction's Opening Brief at 7, 16, Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182 (9th Cir. 2006) (No. CIV-F-97-5498) [hereinafter Appellants' Brief].
212. *City of Fresno*, 433 F.3d at 1196.
213. *Id.* at 1191–96.
214. Appellants' Brief, *supra* note 211, at 8–15.
215. *Id.* at 9.

your backyard," and his announcement that the Wellington would allow "low-income families with children to live near his constituents' neighborhood and attend 'their' schools."[216] These efforts stirred up residents and led to residents making discriminatory outbursts during public meetings concerning the project: "We are going to end up with a lot of kids, with these large bedrooms at Wellington because those Hmongs[217] have a lot of kids"; "All the Hmongs have 13 children"; and referring to one proponent of the project as a "spic."[218] The council thereafter cited community opposition as one reason for the denial.[219] The jury determined, well within its discretion, that such evidence did not constitute a preponderance of the evidence necessary to find that a discriminatory intent motivated the project's denial.[220] However, in light of the substantial discriminatory effect and the evidence of discriminatory intent potentially motivating the City's decision, it is at least plausible, and even likely, that the council's stated reasons were simply a pretext for discrimination. Courts and juries should have the opportunity to consider such evidence within the framework of disparate impact. The other two standards employed by the circuit courts provide that opportunity.

3. The Balancing Test

Under the balancing test, the analysis is far less formulaic. Instead, courts consider four primary factors: "(1) the strength of plaintiffs' showing of discriminatory impact; (2) a quantum of evidence of discriminatory intent; (3) the defendant's interest in the challenged conduct; and (4) whether the plaintiff seeks affirmative relief or an injunction to restrain defendants from interfering with property owners who wish to provide housing."[221] The court looks at each factor and determines which party that factor favors.[222] It then weighs the four factors together to reach its conclusion as to whether the practice violates the FHA.[223] This

216. *Id.* at 9–10 (alterations omitted).
217. The United States Census Bureau counts persons identifying themselves as "Hmongs" as being of the "Asian" race. *Id.* at 13 n.7.
218. *Id.* (alterations omitted).
219. *See id.* at 10. The influx of new children and community opposition were the reasons the City killed the Wellington project. *Id.*
220. Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1191 (9th Cir. 2006).
221. Bain, *supra* note 193, at 1446 n.83 (citing Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977)).
222. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290–93 (7th Cir. 1977).
223. *Id.* at 1293–94.

approach gives judges the ability to address signs of discriminatory pretext if necessary, but it falters by allowing for too much subjectivity because the courts have received little guidance as to how much weight each factor should receive.[224]

As the Court of Appeals for the First Circuit noted in *Langlois v. Abington Housing Authority*, this approach allows individual judges to make significant policy choices by deciding which criteria are more important or worthy.[225] For this reason, uniform interpretation of the FHA and consistent analyses of FHA disparate impact claims would prove nearly impossible under a balancing test as different judges would emphasize different factors. Furthermore, inconsistent analyses of disparate impact claims undermine one of the primary goals of implementing a single standard: making those involved in housing transactions aware of their rights and obligations.[226]

Moreover, as the court in *Langlois* correctly pointed out, having federal judges decide such policy issues is "to impose on them the job of making decisions that are properly made by Congress or its executive-branch delegates."[227] If Congress were to endorse a balancing test, it would reflect its inability and unwillingness to do its job, instead handing that task over to the judiciary, which, although not unprecedented, proves undesirable because the judiciary has already shown a distaste for disparate impact.[228] Finally, "the balancing approach is in tension with the course taken by the Supreme Court and Congress under Title VII where a *standard* of justification is constructed and applied."[229] Courts considering disparate impact claims under the FHA need not, and should not, treat them identically to those under Title VII, but they should treat them similarly.[230]

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224. *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000).
225. *Id.*
226. *See supra* notes 183–85 and accompanying text.
227. *Langlois*, 207 F.3d at 51.
228. *See supra* Part II.A. It was this same sentiment that led Congress to amend Title VII with the Civil Rights Act of 1991. The legislature wanted to take such policy decisions out of the court's hands and place it in the hands of juries. *See* 42 U.S.C. § 2000e (2012).
229. *Langlois*, 207 F.3d at 51.
230. Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 373 (6th Cir. 2007) ("[S]imilar claims under Title VII and the FHA generally should receive similar treatment.").

4. The Hybrid Approach

The hybrid approach combines aspects of both the burden-shifting approach and the balancing test.[231] The first two steps in the hybrid method reflect the burden-shifting approach, while the final step borrows from the balancing test.[232] First, a plaintiff must make out a prima facie case by presenting evidence that the questioned practice has a disparate impact.[233] Thereafter, the burden shifts to the defendant to demonstrate a legitimate interest and show that no alternative practices could accomplish the same end.[234] The court then balances two other factors to determine whether actionable discrimination has occurred.[235] The first factor that courts consider is whether the plaintiff has any evidence of discriminatory intent.[236] Next, the court considers the form of relief the plaintiff seeks to determine whether public policy implications may weigh against siding in the plaintiff's favor.[237] The court then weighs the last two considerations in light of the evidence presented by both parties in the balancing phase to reach its ultimate conclusion.[238]

This mechanism for assessing disparate impact claims provides the best and most effective standard of the three primary standards employed by the courts of appeals for two reasons. First, it provides a structured and objective method in the form of a two-step burden-shifting test. Secondly, it provides a means for courts to consider evidence of intent to determine whether a facially neutral practice is simply a pretext for discrimination. However, the hybrid test still has faults.

The main problem with this test is that some courts seem to *mandate* evidence of intent to support a claim of disparate impact,[239] which is at odds with the fundamental nature of the

231. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).
232. *See supra* Parts III.A.1, 3.
233. *Huntington Branch*, 844 F.2d at 936.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?*, *supra* note 17, at 1153 n.64 (citing Strykers Bay Neighborhood Council v. City of New York, 695 F. Supp. 1531, 1543 (S.D.N.Y. 1988) (dismissing disparate impact case on summary judgment, and not only noting the failure of the plaintiffs to submit evidence of bad faith, but also pointing to evidence of the defendants' good faith)).

disparate impact theory.[240] Although the standard must retain the flexibility to allow for evidence of intent or pretext in those cases where facially neutral practices simply provide a well-designed cover for discriminatory intent (such as in *Affordable Housing Development Corp. v. City of Fresno*),[241] a disparate impact standard should not *demand* evidence of intent. The primary purpose of the disparate impact theory is to prevent discrimination based on facially neutral practices with discriminatory effects, which by definition can survive without proof of a discriminatory intent. A standard that requires evidence of intent renders disparate impact meaningless by equating it with disparate treatment.

Additionally, as part of the hybrid test, courts consider the form of relief requested by the plaintiffs in making their judgment as to whether a violation of the FHA occurred.[242] The form of relief sought by plaintiffs, though, has no bearing on whether discrimination has occurred. If a court finds that a defendant lacks a viable justification for its actions, that court should not have the ability to reverse course and find in favor of the defendant simply because it does not want to force the defendant to take a certain action.[243] Including this element in the standard simply provides an excuse for courts to ignore discriminatory actions.

Proponents of this fourth element argue that courts should "move reluctantly and cautiously" when considering whether to compel a defendant to undertake "affirmative, involuntary action."[244] Although forcing municipalities or private entities to take affirmative steps may seem extreme, in certain instances action is required to reverse the effects of discriminatory practices. Some may fear that allowing such judicial action will subject every town or city to liability if it refuses to provide mixed-income housing or similar developments. However, the legislature can assuage such fears by providing a clear definition of the "practices" that plaintiffs may challenge.[245] A positive definition of the term will prevent plaintiffs from subjecting entities to liability

240. *See supra* Part I.B.

241. Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182 (9th Cir. 2006).

242. *See supra* note 237 and accompanying text.

243. *See* Arthur v. City of Toledo, 782 F.2d 565, 568 (6th Cir. 1986) (referencing district court decision which found plaintiff's claims moot based on the type of relief they sought).

244. United States v. Hous. Auth. of City of Chickasaw, 504 F. Supp. 716, 732 (S.D. Ala. 1980); Gregory Brumfield, *A Closer Look at the Fair Housing Act of 1968: Can the Disparate Impact Theory Affect the Urban Crisis in the City of New Orleans*, 37 S.U. L. REV. 41, 59 (2009).

245. *See supra* note 169 and accompanying text.

for a lack of decision-making, thus shielding entities not actively engaged in discriminatory policy-making. Consequently, an element relating to the type of relief sought is not required in an effective disparate impact standard.

B. Proposing a Proper Standard: The Modified Burden-Shifting Approach

The best disparate impact standard would be similar to the hybrid approach but without the fourth factor that considers the form of relief sought by the plaintiff. This "modified burden-shifting approach" takes the two-step form of the burden-shifting test and modifies it by adding a final pretext consideration, if necessary, in which the plaintiff can introduce evidence of intent that, although insufficient to meet the disparate treatment preponderance of the evidence standard,[246] indicates a potential ulterior motive on the part of the defendant.

In the first step, the plaintiff must make a prima facie statistical showing that the challenged practice has a disparate impact on a protected class. If the plaintiff can meet that burden, then the defendant must show that the practice is *necessary*—i.e., that there are no less-discriminatory alternatives—to achieve a legitimate interest. If the defendant fails to meet that burden, the practice is a violation of the FHA. However, if the defendant can meet that burden, the practice will not violate the FHA unless the plaintiff has sufficient evidence of discriminatory intent. In order to prevail at this third step, the plaintiff must demonstrate through a "strong basis in evidence" that the facially neutral practice is in actuality motivated by discriminatory intent. The "strong basis in evidence" standard is best for this inquiry because the Court has already endorsed its use with disparate impact,[247] and it provides a more lenient standard than "preponderance of the evidence" while also requiring that plaintiffs have a legitimate, meaningful standard to attain so that just any bare-bones evidence will not suffice.[248] A strong basis in evidence that the defendant acted intentionally, in conjunction with significant discriminatory effects, should render a practice unlawful.

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246. Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 188 F. Supp. 2d 1148, 1162 (D.S.D. 2002). Under FHA disparate treatment standard, the plaintiff has "the opportunity to prove by a *preponderance of the evidence* that the legitimate reasons asserted by the defendants are in fact mere pretext." *Id.* (emphasis added).

247. *See* Ricci v. DeStefano, 557 U.S. 557, 585 (2009).

248. *See generally* Johnson, *supra* note 117.

This standard for analyzing FHA disparate impact claims rises above those standards currently employed by the circuit courts for three main reasons: (1) its objective burden-shifting foundation employs an equitable two-step, rather than three-step, formulation that requires the defendant to show that less-discriminatory alternatives do not exist; (2) it provides a third pretext element that allows, but does not require, plaintiffs to argue that a defendant's facially neutral practice is simply a pretext for intentional discrimination; and (3) it does not include any arbitrary, irrelevant factors such as the type of relief that the plaintiff requests. In practice, the modified burden-shifting standard will allow courts to address the two types of discrimination that disparate impact has traditionally tried to address: facially neutral practices with *inadvertent* discriminatory effects and facially neutral practices with discriminatory effects that are a result of well-hidden discriminatory intent that falls outside the reach of a disparate treatment claim.[249]

Consider again *Affordable Housing Development Corp. v. City of Fresno*.[250] The first step of the modified burden-shifting standard would apply identically to that of the burden-shifting standard used by the court in *City of Fresno*.[251] The plaintiffs would have to provide statistical evidence that the City's practice had a significant disproportionate effect on a protected class. In *City of Fresno*, the plaintiffs sufficiently demonstrated that the City's decision to deny funding had a discriminatory effect.[252] If the plaintiffs meet their burden, the burden would then shift to the defendant. Under the modified burden-shifting framework, the defendant must show that its practice had a manifest relationship to a legitimate interest and that no other less-discriminatory alternatives existed. In *City of Fresno*, the defendant met that burden.

The City showed legitimate reasons for denying funding for the project: the impact of a large rental unit on neighboring property values and an arguable lack of need for the project.[253] The City's decision displayed an obvious relationship to the legitimate interest—it denied funding so as not to have an unneeded apartment building constructed in an area where it would bring down neighboring property values.[254] Finally, because it was a

249. *See supra* notes 17–18 and accompanying text.
250. *See supra* Part III.A.2.; *see generally* Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182 (9th Cir. 2006).
251. *See City of Fresno*, 433 F.3d at 1194.
252. *Id.* (stating that A.H.D.C. "made a prima facie showing of discrimination").
253. *Id.* at 1196.
254. *See id.*

simple up-and-down vote, there were no alternative decisions the City could have made regarding funding to achieve the same end.[255] Therefore, the City would meet its burden at the second step of the modified-burden shifting approach. In most cases, this would signal the end of the inquiry because although the plaintiff identified a discriminatory effect resulting from the facially neutral practice, the defendant presented a justifiable defense. As the Ninth Circuit noted in *City of Fresno*, "[a] governmental interest in not giving approval may outweigh the desirability of furnishing low-rent housing."[256] This formulation allows entities engaged in housing transactions to further legitimate interests despite the existence of a disparate impact. The practice with a discriminatory effect will be permitted as long as: (1) the entity is not covering for discriminatory motives; and (2) it has done its due diligence on the front end (in other words, it has determined that less-discriminatory alternatives do not exist).

However, the modified burden-shifting standard also has the flexibility to assist plaintiffs possessing some evidence of discriminatory intent that may not reach the preponderance of the evidence level required for success in disparate treatment claims. In the optional third step of this proposed standard, the plaintiff would have the opportunity to bring forth evidence of discriminatory intent that may have motivated the defendant's adoption of the facially neutral policy. Under this analysis, the trier of fact should determine whether the evidence provides a "strong basis" for believing that the defendant acted intentionally. A strong basis in evidence that the defendant acted intentionally, in conjunction with significant discriminatory effects, should render a practice unlawful.

In *City of Fresno*, the plaintiffs could have introduced their evidence of intent under this third step and made it *relevant* to the disparate impact determination. The *City of Fresno* appellant's brief reveals significant evidence showing that the community's negativity towards the housing development was largely race-based.[257] Moreover, it demonstrates that one of the City's reasons for denying funding was the community opposition.[258] Not only does this establish that the City rejected the proposal at least partly in response to the community's discriminatory motivations, but it also undercuts the "legitimate" interest argued at trial. Moreover, the City had a policy of confining all low-income housing to its inner city, which not only perpetuates segregation but also indicates a

255. *Id.* at 1195–96.
256. *Id.* at 1196.
257. Appellants' Brief, *supra* note 211, at 10–13.
258. *Id.*

similar history of discriminatory motives.[259] Accordingly, a trier of fact could—and should—find a strong basis in evidence for the proposition that discriminatory intent motivated the City's decision. The modified burden-shifting approach allows such evidence to influence the outcome of disparate impact cases and hold entities liable for discriminatory motives. This standard protects against local governments' discriminatory practices as described above, and it also protects against the discriminatory practices of real estate agents and financial institutions. Those entities often perpetuate segregation by implementing facially neutral policies that are simply a pretext for discrimination, such as racial steering.[260]

Lending discrimination is a persistent problem, and lenders have maneuvered around anti-discrimination laws by carefully implementing race-neutral criteria that allow them to continue their discriminatory lending patterns.[261] For example, lenders can use facially neutral criteria that have a known discriminatory effect to deny loans to minorities seeking housing in traditionally white neighborhoods.[262] Or, as described in the example above where the lending institution denied loans on all homes under $100,000, lenders can find race-neutral criteria for denying loans to minorities on a much wider scale.[263] A Title VII-like burden-shifting framework would often permit such action because of the facially neutral practice tailored toward the legitimate interest of only handing out profitable loans. However, the modified burden-shifting test would allow plaintiffs in the final pretext step to present evidence that the lender has simply found a roundabout way to discriminate based on race. By maintaining the capacity to punish well-designed pretexts, and by allowing for fair and effective adjudication of disparate impact claims even when intent plays no role, the modified burden-shifting approach rises above the standards currently employed by the circuit courts.

Based on this Comment's extensive comparison of the FHA to Title VII, one could believe that the legislature, if it does act, should implement an FHA standard identical to that used in Title VII claims. Nevertheless, several factors weigh against an identical

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259. *Id.* at 16.

260. "Racial steering" refers to housing providers' practice of showing, or providing funding for, homes to individuals in certain locations based on their race. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 366–70 (1982).

261. *See generally* Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787 (1995).

262. *See id.* at 822–23.

263. *See supra* Part I.B.

standard. Courts considering disparate impact claims under the FHA should treat them similarly, not identically.[264]

The first factor weighing against an identical standard is that the defendant, rather than the plaintiff (as in Title VII), should have to show that no less-discriminatory alternatives exist as a part of the second step of the analysis.[265] Second, the disparate impact standard for FHA cases must differ from Title VII by including the option of a third step for considering pretext because data indicates that segregation in the workplace has begun to decrease,[266] while residential segregation remains pervasive.[267]

"The U.S. workforce is undoubtedly becoming more diverse,"[268] and thus concerns over employers disguising discriminatory motivations in facially neutral employment practices, although not completely gone, should decrease. Studies have contended that this increase in workplace diversity can contribute to employers becoming more "cognizant of potentially racially biased behavior,"[269] thus signaling that employment discrimination should continue to decrease. On the other hand, the prevalence of residential segregation signifies, and data supports the conclusion, that discriminatory housing practices continue to occur regularly.[270] The third step of the modified burden-shifting approach is designed to address such situations—among others—as those where financial institutions purport to base loan decisions on race-neutral profitability data but in actuality manipulate factors in determining creditworthiness to maintain the status quo of segregated neighborhoods. The pervasiveness of residential segregation and the smarmy tactics used by entities engaged in housing transactions commands that the FHA standard deviate from the Title VII standard.

Lest one accept the contention that disparate impact under the FHA should differ from that of Title VII yet insist that the

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264. Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 373 (6th Cir. 2007) ("[S]imilar claims under Title VII and the FHA generally should receive similar treatment.").

265. *See supra* Part III.A.1.

266. *See* Crosby Burns, Kimberly Barton, & Sophia Kerby, *The State of Diversity in Today's Workforce: As Our Nation Becomes More Diverse So Too Does Our Workforce*, CTR. FOR AM. PROGRESS (July 12, 2012), *available at* http://www.americanprogress.org/issues/labor/report/2012/07/12/11938/the-state-of-diversity-in-todays-workforce/, archived at http://perma.cc/B4RW-F366.

267. *See generally* Vanhemert, *supra* note 6.

268. *See generally* Burns et al., *supra* note 266.

269. Elizabeth Hirsh & Christopher J. Lyons, *Perceiving Discrimination on the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination*, 44 LAW & SOC'Y REV. 269, 278 (2010).

270. Cable, *supra* note 1. S*ee also supra* note 14 and accompanying text.

modified burden-shifting standard simply strays too far, it should be noted that inclusion of a pretext element in disparate impact claims is well-established in multiple jurisdictions. Two of the standards currently employed by the courts of appeals, the balancing test and the hybrid approach, utilize such a component.[271] Furthermore, under Canadian law, courts use a single, uniform standard for analyzing employment discrimination claims, regardless of whether the plaintiff alleges disparate treatment or disparate impact.[272] The standard contains a good faith element, thus allowing Canadian courts to consider evidence of intent when evaluating disparate impact claims.[273] Accordingly, this is an element that many jurisdictions, as well as scholars,[274] consider useful in evaluating a defendant's justification. Additionally, as noted above, scholars and courts also support the use of a two-step burden-shifting foundation for the disparate impact standard.[275] Hence, codification of the modified burden-shifting standard would not be a drastic departure from how some courts currently handle FHA disparate impact cases, and it proves a far better fit than the standard used under Title VII. This standard allows courts the flexibility to consider evidence of intent, when necessary, to flush out those practices that appear neutral but truly cover for an actor's discriminatory motive.

C. Codification: Incorporation of the Modified Burden-Shifting Approach Into an FHA Amendment

With respect to the inclusion of the modified burden-shifting standard in an FHA amendment, the legislature should look to the Civil Rights Act of 1991 for guidance because the Act provides a good starting point in terms of structure.[276] The proposed amendment, included in Appendix A, would mesh the disparate impact language provided by Schwemm and Pratt[277] with language supporting the modified burden-shifting standard and incorporate it into the structure supplied by the Civil Rights Act of 1991.[278] The most significant change, outside of replacing employment law language with fair housing language, comes in part (1)(A) where

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271. *See supra* Part III.A.
272. *See* British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3, 48 (Can.).
273. *See id.*
274. *See* Primus, *supra* note 162, at 520; Rutherglen, *supra* note 18, at 1299.
275. *See supra* Part III.A.1.
276. *See* 42 U.S.C. § 2000e-2(k) (2012).
277. *See supra* Part II.B.
278. *See* Appendix A.

the modified burden-shifting standard, in clear and concise terms, explains how courts should analyze—and allocate the burden of proof in—FHA disparate impact cases.[279] The ambiguous and confusing language used to explain the standard for employment cases is eliminated to include the following standard for FHA cases:

> Burden of proof in discriminatory impact cases:
>
> (1) (A) An unlawful housing practice based on disparate impact is established under this subchapter if—
>
> (i) a complaining party demonstrates that a respondent uses a particular housing practice that causes a disparate impact on the basis of race, color, religion, sex, familial status, national origin, or handicap; and
>
> (ii) the respondent fails to demonstrate that the challenged practice has a legally sufficient justification;[280] or
>
> (iii) the complaining party introduces enough evidence of discriminatory intent to form a strong basis that respondent's legally sufficient justification is a pretext for unlawful discrimination.

This amendment to the FHA will provide clear support for the use of the disparate impact theory under the FHA, while also supplying courts with a clear and uniform standard for the equitable adjudication of FHA disparate impact claims. Residential segregation has persisted for too long, and with the Supreme Court poised to put an end to disparate impact under the FHA, Congress must respond by codifying the theory and the modified burden-shifting approach within the Fair Housing Act.

CONCLUSION

"It is all about 'here' . . . that is the way we have to think about social issues."[281] Minnijean Brown-Trickey, one of the "Little

279. *See id.*

280. *See id.* A "legally sufficient justification" is one that: (A) furthers one or more of the user's legitimate, non-discriminatory interests; and (B) cannot be served by an alternative practice with a less discriminatory impact. SCHWEMM & PRATT, *supra* note 104, at 29.

Rock Nine" who helped to desegregate Little Rock's Central High School in 1957, conveyed this message on January 17, 2014, while speaking at an event honoring the birthday of Reverend Martin Luther King, Jr.[282] Her words aptly fit the situation confronting this country with regards to its housing patterns. As the 2010 Census data maps indicate, residential segregation remains pervasive in this country.[283] The only change likely to come is the Supreme Court's elimination of disparate impact claims under the FHA in *Inclusive Communities*,[284] which will only serve to reinforce the status quo of segregation by removing a major tool needed for purging the epidemic. Doomsday is looming with *Inclusive Communities* sitting before the Justices, and Congress cannot allow a crushing blow from the Court or another shortsighted settlement to continue to emasculate the FHA—an amendment to the FHA is a must no matter the outcome.

This Comment's proposed amendment will not only guarantee the disparate impact cause of action for plaintiffs, but it will also clarify and improve the effectiveness of the law by implementing a modified burden-shifting standard for analyzing disparate impact claims under the FHA. The modified burden-shifting standard has the capacity to address facially neutral practices with a discriminatory effect, whether that effect is inadvertent, or whether the actor intended it and used the facially neutral practice as a pretext for his or her discriminatory motive. It also provides an objective framework closely correlated to the FHA's underlying purpose of ensuring fair housing for all.[285] If Congress is finally willing to stand behind its rhetoric and put an end to residential segregation, the first step in that direction is to codify disparate impact and the modified burden-shifting standard. The opportunity is here, and the time is now.

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281. Benjamin Alexander-Bloch, *At MLK Event, One of "Little Rock Nine" Discusses Desegregation, Social Activism*, THE TIMES PICAYUNE (Jan. 18, 2014, 1:00 PM), http://www.nola.com/education/index.ssf/2014/01/at_mlk_event_one_of_little_roc.html, archived at http://perma.cc/VBB2-DG8R (quoting Minnijean Brown-Trickey).

282. *Id.*

283. *See* Cable, *supra* note 1.

284. *See supra* Part II.A.

285. *See supra* note 157 and accompanying text.

APPENDIX A

Proposed Amendment to the Fair Housing Act Including Disparate Impact Language and the Modified Burden Shifting Standard[286]

Unjustified discriminatory impact: Prohibited actions for purposes of this subsection include:

(1) employing any practice that has an adverse impact based on race, color, religion, sex, familial status, national origin, or handicap unless that practice is shown by the party employing it to have a legally sufficient justification.

Burden of proof in discriminatory impact cases:

(1) (A) An unlawful housing practice based on disparate impact is established under this subchapter if—
  (i) a complaining party demonstrates that a respondent uses a particular housing practice that has an adverse impact on the basis of race, color, religion, sex, familial status, national origin, or handicap; and
  (ii) the respondent fails to demonstrate that the challenged practice has a legally sufficient justification; or
  (iii) the complaining party introduces enough evidence of discriminatory intent to form a strong basis that respondent's legally sufficient justification is a pretext for unlawful discrimination.

(B) (i) With respect to demonstrating that a particular housing practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged housing practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one housing practice.

(ii) If the respondent demonstrates that a specific housing practice does not cause the disparate impact, the respondent shall not be required to meet its burden outlined in subparagraph (A)(ii).

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286. The structure and much of the language used for this sample statute is borrowed from that used in the Civil Rights Act of 1991 and the work of Robert G. Schwemm and Sara K. Pratt in *Disparate Impact Under the Fair Housing Act: A Proposed Approach*. *See* 42 U.S.C. § 2000e-2(k) (2012); SCHWEMM & PRATT, *supra* note 104, at 28–29.

(2) A demonstration that a housing practice is required as the necessary means to a legitimate business or governmental interest may not be used as a defense against a claim of intentional discrimination under this subchapter.

For purposes of this subsection:
(1) "practice" includes any practice, policy, procedure, process, standard, elements of practices, policies, procedures, processes, or standards that are not capable of being separated for analysis, and any other action that is intended to evaluate or affect a group of persons.
(2) "adverse impact" means a substantially different rate of selection which works to the disadvantage of members of a race, sex, ethnic group, religion, [etc.]. The term "substantially" means the same as it has been interpreted in prior judicial and HUD administrative decisions under this Act and in prior judicial decisions and administrative regulations under Title VII.
(3) A "legally sufficient justification" is one that:
   (A) furthers one or more of the user's legitimate, non-discriminatory interests; and
   (B) cannot be served by an alternative practice with a less discriminatory impact.
(4) A "legally sufficient justification" must:
   (A) bear a manifest relationship to the practice that is challenged; and
   (B) have a significant correlation with important elements of the operation of the housing opportunity or business; and
   (C) involve a matter of substantial concern to the operation of the housing opportunity or business; and, be more effective in accomplishing its purpose than any less discriminatory alternative.
(5) A "legally sufficient justification" may not be hypothetical, speculative, or insubstantial.

Cornelius J. Murray IV[*]

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